(2)

No. 84-489

Supreme Court, U.S.
FILED
JAN 17 1985
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1984

PENNSYLVANIA BUREAU OF CORRECTION, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

CHRISTINE R. WHITTAKER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

GERALD AUERBACH
General Counsel
United States Marshals Service
McLean, Virginia 22102

QUESTION PRESENTED

Whether the court of appeals erred in reversing an order of the magistrate requiring the United States Marshals Service rather than the State to transport state prisoners to the federal courthouse in connection with an action brought by one of the state prisoners against county officials under 42 U.S.C. 1983.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Ballard v. *Spradley*, 557 F.2d 476 6

Ford v. *Allen*, 728 F.2d 1369 ..... 5, 6

Ford v. *Carballo*, 577 F.2d 404 6

Ivey v. *Parke*, appeal pending, No. 84-5271 (6th Cir. filed Mar. 30, 1984) 6

Maine v. *Thiboutot*, 448 U.S. 1 4

McGee v. *Rankin*, 584 F. Supp. 1202, appeal pending *sub nom. Arkansas Department of Corrections* v. *United States Marshals Service*, No. 84-1664-WA (8th Cir. filed May 18, 1984) 6

Story v. *Robinson*, 689 F.2d 1176 ..... 3, 6

United States v. *Mauro*, 436 U.S. 340 5

United States v. *New York Telephone Co.*, 434 U.S. 159 ..... 4, 5

Wiggins v. *County of Alameda*, 717 F.2d 466, cert. denied *sub nom. California Department of Corrections* v. *United States*, No. 83-634 (Feb. 27, 1984) 4, 5, 6

Page

Statutes and rule:

All Writs Act, 28 U.S.C. 1651 4

Interstate Agreement on Detainers Act, 18 U.S.C. App. at 545 7

§ 2, Art. V(a) 7

§ 2, Art. V(h) 7

28 U.S.C. 636(c)(3) 2

28 U.S.C. 2241(c)(5) 4

28 U.S.C. 2243 5

42 U.S.C. 1983 ..... 1, 4

Fed. R. Civ. P. 81(a)(2) 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-489

PENNSYLVANIA BUREAU OF CORRECTION, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-45a) is reported at 737 F.2d 1283. The opinion of the magistrate (Pet. App. 46a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-3a) was entered on June 27, 1984. The petition for a writ of certiorari was filed on September 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action began when a state prison inmate, Richard Garland, brought suit in the United States District Court for the Eastern District of Pennsylvania under 42 U.S.C. 1983 against various Philadelphia County officials who

allegedly violated his civil rights by beating and harassing him. The district court assigned the proceeding to a magistrate, who issued a writ of habeas corpus ad testificandum for the production at trial of Garland and four other state prisoners identified as proposed witnesses by plaintiff. The writ was addressed to the state custodians of these prisoners and to the United States Marshal; it required that the state prison officials transport the five state inmates from their institutions of confinement to the county jail nearest the federal courthouse in Philadelphia and that the United States Marshal transport the inmates from the county jail to the federal court and maintain custody of them during the trial. Pet. 5.

The Marshal intervened and moved for reconsideration of that portion of the magistrate's order that directed him to transport the state prisoners from the county jail to the federal courthouse and guard them during trial. The magistrate denied the motion (Pet. App. 46a-65a). The magistrate acknowledged that his order was contrary to the historical practice in the Eastern District of Pennsylvania regarding the responsibility of the Marshal for the transportation of state prisoners in connection with private civil rights actions (*id.* at 48a, 50a-51a, 56a). Nevertheless, the magistrate found that he had legal authority, in issuing a writ of habeas corpus ad testificandum, to require the Marshal to take custody over state prisoners outside the federal courthouse and to transport them to court (*id.* at 51a-62a).

2. On the Marshal's appeal from the denial of reconsideration,[1] the court of appeals reversed in part and affirmed

---

[1]Because the case had been referred to the magistrate for trial by the consent of the parties, appellate review lay directly in the court of appeals rather than in the district court. See 28 U.S.C. 636(c)(3). Since the magistrate's order to the United States Marshal was collateral to the merits of the underlying civil rights action and fully and finally disposed

in part (Pet. App. 4a-45a). Relying on its earlier decision in *Story* v. *Robinson*, 689 F.2d 1176 (3d Cir. 1982), the court of appeals held that district courts, and therefore magistrates, have no statutory authority generally to require the Marshal to transport state prisoners from state or county facilities to the federal courthouse. It also held that, as part of his responsibility for courthouse security, the Marshal could be ordered to take custody over state prisoners while they are in federal court. Finally, the court of appeals held that, incident to that security responsibility, the Marshal could be directed to take custody of state prisoners outside the federal courthouse and transport them to court if the trial judge "makes a specific finding that special security circumstances exist which require an order that state prisoner witnesses be taken into the Marshal's custody at a situs away from the federal courthouse" (Pet. App. 22a-23a). Since there was no general statutory authority to require the Marshal to transport state prisoners, and since the magistrate had made no finding of special security circumstances in this case, the court of appeals reversed the magistrate's order insofar as it obligated the Marshal to assume custody of the state prisoners outside the courthouse and transport them to court.

ARGUMENT

In our view, the magistrate in this case erred in requiring the United States Marshal to transport the state prisoners to the federal courthouse.[2] As the court of appeals recognized (Pet. App. 9a-10a, 15a, 17a-18a), the State is simply

---

of the issue concerning transportation of the state prisoners, the court of appeals held that it had jurisdiction over the appeal pursuant to the collateral order doctrine (Pet. App. 8a-9a).

[2]In defending the magistrate's order, petitioner fails to make clear whether it contends that the magistrate was required to direct the Marshal to transport the state prisoners (see *Story* v. *Robinson*, 689 F.2d at 1177, 1178, 1181) or that the magistrate had discretion to do so and did not abuse his discretion in the circumstances of this case.

attempting to shift from itself to the "deep pocket" of the United States treasury the expense of producing state prisoners to testify in court. We see no reason why the federal government should be forced to bear the cost of transporting state prisoners in connection with a lawsuit by a state prisoner against county officials for acts done under color of state law.[3]

This Court recently denied review of the identical issue that petitioner raises. See *Wiggins* v. *County of Alameda*, 717 F.2d 466 (9th Cir. 1983), cert. denied *sub nom. California Department of Corrections* v. *United States*, No. 83-634 (Feb. 27, 1984).[4] As we now discuss, no developments subsequent to that denial of certiorari call for a different result in this case.[5]

---

[3]Indeed, Garland's lawsuit could equally well have been filed in state court (see *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980)), in which event it would be frivolous to argue that the United States had any obligation to participate in transporting state prisoners. The fact that Congress has provided a forum for the resolution of disputes under 42 U.S.C. 1983 should hardly subject the United States to the duty of assisting the State in transporting state prisoners in connection with a lawsuit to which the federal government is not a party.

[4]A copy of our brief in opposition in *California Department of Corrections* is being sent to counsel for petitioner.

[5]We also point out, as the court of appeals noted (Pet. App. 13a; see also *id.* at 15a), that neither in the district court nor on appeal did petitioner invoke the All Writs Act, 28 U.S.C. 1651, as a source of statutory authority to require the Marshal to transport state prisoners. Nonetheless, in this Court petitioner heavily relies (Pet. 10-16) on Section 1651 and on this Court's construction of the statute in such cases as *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977). However, *New York Telephone* and the other cases do not support petitioner's position. First, in those decisions Section 1651 was used to fill in the interstices of federal statutes where no specific provision explicitly addressed the issue under consideration; here, in contrast, as petitioner concedes (Pet. 15), the habeas corpus statute expressly provides for issuance of the writ to bring a prisoner to court to testify (28 U.S.C. 2241(c)(5)) and states that "[t]he writ * * * shall be

In *Ford* v. *Allen*, 728 F.2d 1369 (11th Cir. 1984) (per curiam), the court of appeals held that the district court has discretion to require the United States Marshal to transport state inmates from the state prison to the federal courthouse; it declined to consider whether that discretion had been properly exercised, holding only that the district court had statutory authority to impose the responsibility on the Marshal (*id.* at 1370). The court noted (*ibid.*) that its ruling was in accord with the decision of the Ninth Circuit in the *California Department of Corrections* case in which this Court denied certiorari. The Eleventh Circuit's ruling is also in line with the decisions of other circuits, which existed at the time of the denial of certiorari in *California Department of Corrections*, that recognize the discretion of the district

---

directed to the *person having custody of the person detained*" (28 U.S.C. 2243; emphasis added). See *United States* v. *Mauro*, 436 U.S. 340, 357 (1978); see also Fed. R. Civ. P. 81(a)(2). Second, in *New York Telephone* the issuance of the writ was "necessary" (434 U.S. at 161) to "effectuate and prevent the frustration of orders [the district court] has previously issued" (*id.* at 172); in this case, on the other hand, it was not necessary or even appropriate to order the Marshal to transport state prisoners to federal court, since under the habeas corpus statute the state custodian could be required to produce them. Third, *New York Telephone* involved a private party that was directed to provide assistance to the government; thus, that case involved none of the considerations of separation of powers and sovereign immunity that are applicable where, as in the present case, the Executive is subject to an order of a court to take action or expend public funds. Fourth, in *New York Telephone* the third party subject to the writ was to be "fully reimbursed at [its] prevailing rates" for the assistance it was to provide, and compliance with the writ "required minimal effort on the part of the [third party] and no disruption to its operations" (434 U.S. at 175); here, however, no provision of the magistrate's order required the State to reimburse the Marshal or ensured that the transporting of state prisoners would not interfere with the Marshal's statutory responsibilities. Finally, *New York Telephone* does not authorize the use of the All Writs Act whenever the issuance of a writ would not impose an unreasonable burden; rather, the Court merely recognized (434 U.S. at 172) that a writ otherwise authorized by the statute would be improper if it resulted in an unreasonable burden.

court to order the Marshal to transport state prisoners.[6] Clearly *Ford* v. *Allen* does not make the petition in this case any more worthy of the Court's review than was the petition in *California Department of Corrections*.

We acknowledge that the decision below, which is the only other opinion rendered since the denial of certiorari in *California Department of Corrections,* adopts a somewhat different standard from previous decisions on the authority of the district court to involve the United States Marshal in transporting state prisoners to federal court. The Third Circuit concluded that, under the applicable statutes, the district court has no discretion generally to impose that responsibility on the Marshal. However, the court upheld the district court's discretion to do so when justified by security considerations. While this discretion may appear to be of a more limited nature than that recognized in other circuits, the application and consequences of the Third Circuit's ruling are uncertain at this time. It cannot now be known how the Third Circuit and its district courts will interpret this standard. Nor is it clear whether the courts in other circuits might have been influenced by similar sorts of security considerations in exercising their discretion. Thus, further experience is necessary to determine whether the courts in different circuits will actually reach conflicting results in specific cases or whether the perceived differences in the tests are largely semantic rather than substantive. In light of the need for such clarification and the Court's recent

---

[6]See *Ford* v. *Carballo,* 577 F.2d 404 (7th Cir. 1978); *Ballard* v. *Spradley,* 557 F.2d 476 (5th Cir. 1977); see also *Story* v. *Robinson, supra.* This issue is also pending in other circuits. See *McGee* v. *Rankin,* 584 F. Supp. 1202 (W.D. Ark. 1984), appeal pending *sub nom. Arkansas Department of Corrections* v. *United States Marshals Service,* No. 84-1664-WA (8th Cir. filed May 18, 1984); *Ivey* v. *Parke,* appeal pending, No. 84-5271 (6th Cir. filed Mar. 30, 1984).

denial of certiorari in *California Department of Corrections,* we believe that review of the instant petition is not warranted.

Moreover, the United States Marshals Service has advised us that, if the Court denies certiorari, it intends promptly to seek legislation as a more satisfactory means than litigation for finally resolving this issue.[7] We agree that a legislative solution is preferable, since it would allow Congress to focus specifically on the issue and to weigh the competing interests of the respective parties in this era of expanding judicial dockets and limited governmental resources at all levels; it is eminently a choice for Congress to make whether the funds allocated to the Marshals Service should be spent for transporting state prisoners in connection with Section 1983 litigation or whether they would be better used to support other aspects of the federal judicial system. See Pet. App. 44a-45a (Becker, J., concurring). In addition, Congress can also consider a variety of systemic mechanisms and alternative approaches — such as the presentation of testimony through depositions taken in the prison (cf. Pet. App. 62a-64a), or sending magistrates to conduct proceedings at the prison where necessary — to reduce the problem of transporting prisoner witnesses. Finally, legislation would be better suited than litigation to take account of the range of historical practices and the understandings that have been developed in light of local conditions in the

---

[7]Compare, *e.g.,* the Interstate Agreement on Detainers Act, 18 U.S.C. App. at 545-548. In Section 2, Article V (a) and (h), the Act specifically provides that the sending "State shall offer to deliver temporary custody of [the requested] prisoner to the appropriate authority in the [receiving] State" and that "[f]rom the time that [the receiving] State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the [receiving] State * * * shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner."

districts and divisions around the country. In the end, rather than trying to divine congressional intent in this area from general statutes that were first enacted long ago, the interests of all concerned in an informed and sound resolution would be served if the Court stays its hand in this case and allows an opportunity for the legislative process to go forward.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

CHRISTINE R. WHITTAKER
Attorney

GERALD AUERBACH
General Counsel
United States Marshals Service

JANUARY 1985

DOJ-1985-01